

STATE OF MICHIGAN
COURT OF APPEALS

C.G. AUTOMATION & FIXTURE, INC.,

Plaintiff-Appellee,

v

AUTOFORM, INC., and AUTOLIV A.S.P., INC.,

Defendants,

and

KEY PLASTICS L.L.C.,

Defendant-Appellant,

and

CHRYSLER L.L.C.,

Defendant-Appellee.

FOR PUBLICATION

January 20, 2011

No. 286361

Kent Circuit Court

LC No. 07-009314-CK

Advance Sheets Version

Before: MARKEY, P.J., and ZAHRA and GLEICHER, JJ.

GLEICHER, J. (*concurring*).

I fully concur in the majority opinion, but write separately to express my belief that MCL 445.619(4) renders that section of the molders' lien act ambiguous. In my view, legislative reconsideration of the statutory language would benefit the tool-and-die and automotive industries as well as the legal community.

In MCL 445.619(1) and (2), the Legislature clearly and unambiguously commanded that molders seeking an enforceable lien undertake two mandatory actions by stating in subsection (1) that "[a] moldbuilder shall permanently record" specified identifying information on every die, mold, or form and in subsection (2) that "[a] moldbuilder shall file a financing statement" under MCL 440.9502. However, at this point the waters of statutory interpretation become muddled. Subsection (3) envisions that a moldbuilder will have "a lien on any die, mold, or form identified pursuant to subsection (1)." MCL 445.619(3). One reasonable interpretation of this language suggests that even absent the moldbuilder's filing of a financing statement, the moldbuilder will have acquired an enforceable lien if it has permanently affixed identifying

information on the tool. But subsection (3) then continues, “The information that the moldbuilder is required to record on the die, mold, or form under subsection (1) *and* the financing statement required under subsection (2) shall constitute actual *and* constructive notice of the moldbuilder’s lien” *Id.* (emphasis added). This sentence reasonably lends itself to construction in either of two ways. The first is that the combination of permanent moldbuilder identification and the filing of a financing statement under the Uniform Commercial Code (UCC) together amount to actual and constructive notice of a lien. Alternatively, the Legislature perhaps intended that permanent identification constitutes actual notice, while a filed UCC statement equates with constructive notice; acceptance of this second reading would essentially obligate a court to engraft onto the final clause of subsection (3) the notion that the permanent recording and the UCC filing “shall constitute actual and constructive notice[, *respectively*,] of the moldbuilder’s lien” Adoption of the second reading of subsection (3) thus would ignore the well-established principle of statutory construction that a court “is not free to add language to a statute or to interpret a statute on the basis of this Court’s own sense of how the statute should have been written.” *Kirkaldy v Rim*, 478 Mich 581, 587; 734 NW2d 201 (2007) (CAVANAGH, J., concurring); see also *In re Wayne Co Prosecutor*, 232 Mich App 482, 486; 591 NW2d 359 (1998) (emphasizing that “[a] court must not judicially legislate by adding into a statute provisions that the Legislature did not include”).

Subsection (4) intensifies the interpretive difficulties presented by the molder’s lien act. That subsection provides that a moldbuilder’s lien attaches “when actual *or* constructive notice is received.” MCL 445.619(4) (emphasis added). In the estimation of federal bankruptcy judge Phillip J. Shefferly, who construed the molder’s lien act in *In re Plastech Engineered Prod, Inc*, 418 BR 235, 245 (ED Mich Bankr, 2009), subsections (3) and (4), when read together, render the statute “inescapably ambiguous.”¹ Judge Shefferly reasoned:

Sub[section] 4 injects an additional element of doubt in construing the statutes by providing that the lien “attaches when actual or constructive notice is received.” The problem caused by this language is that under subsection 3, the references to the information required to be inscribed on the tooling and the financing statement required to be filed are written with the conjunctive *and*, which suggests that both acts together constitute actual and constructive notice of the lien. However, subsection 4 arguably calls this construction into question by using the disjunctive *or* between “actual” and “constructive” notice. The disjunctive *or* in this sentence suggests that there might be actual notice without constructive notice and vice versa. In other words, if the lien can attach when there is only the actual notice provided by the inscription on the tooling, does this mean that attachment can occur without the constructive notice that a UCC financing statement provides? Similarly, if there is only a UCC financing

¹ Although this Court may choose to agree with the analysis of a federal court decision, “federal court decisions are not precedentially binding on questions of Michigan law” *American Axle & Mfg, Inc v Hamtramck*, 461 Mich 352, 364; 604 NW2d 330 (2000).

statement that provides the constructive notice, can attachment occur without the actual notice that is provided by the inscription on the tooling? [*Id.* at 244.]

Judge Shefferly resolved the statute's apparent ambiguity by examining its structure, legislative history, applicable caselaw, and secondary sources. *Id.* at 244-247. He concluded that MCL 445.619 "require[s] a two step process in order to obtain an enforceable lien: the permanent recording of information on the mold or tool, *and* the filing of a financing statement in accordance with section 9502 of the UCC." *Id.* at 247 (emphasis added). Judge Shefferly's reconciliation of the statutory language is entirely consistent with the result we reach today.

Our Supreme Court has emphasized that "[a] provision of the law is ambiguous only if it irreconcilably conflicts with another provision or when it is *equally* susceptible to more than a single meaning." *Fluor Enterprises, Inc v Dep't of Treasury*, 477 Mich 170, 177-178 n 3; 730 NW2d 722 (2007) (brackets and quotation marks omitted). I would hold that with regard to whether a molder's lien exists in the absence of a UCC filing statement, the statutory language is equally susceptible to more than a single meaning. I agree entirely with the sentiments expressed in an article published in the November 2010 *Michigan Bar Journal* that the molder's lien act is "in desperate need of overhaul" and that amendment "would foster more predictability in judicial construction and interpretation of the statutory language" Mears, *Amending the Michigan tooling lien statutes*, 89 Mich B J 11, 40 (Nov 2010). Nevertheless, I believe that the statute clearly and unambiguously envisions that absent the permanent recording of identifying information, a moldbuilder possesses no lien.

/s/ Elizabeth L. Gleicher